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March 9, 2010

Senator Thomas Gaffey, Co-Chair
Representative Andrew Fleishmann, Co-chair
Connecticut General Assembly
Education Committee
Legislative Office Building,
Room 2500
Hartford, CT 06106

Re: H.B. 5425 AAC Special Education

Dear Senator Gaffey, Representative Fleishmann, and Members of the Committee,

I am writing to urge you and the members of the Education Committee to reject Section 3 of H.B. 5425 and to revise and amend a portion of Section 2 of H.B. 5425.

I am an attorney who has practiced in the area of special education law for over twenty-five (25) years representing parents and children. I am of the opinion that Section 3 of the proposed legislation is an affront to the rights of parents who elect to file for hearings and will unfairly burden such parents and this section should be rejected. I believe that Section 2 should be revised to ensure that ABA services are provided and/or monitored by certified BCBA's.

SECTION 3.

Since July 1, 2000, the Department of Education had enacted a formal regulation, approved by the General Assembly, requiring the party requesting a special education Due Process hearing to carry the burden of proof and persuasion. Separate and apart from that requirement, the Department's regulation also required the school district to establish that its special education program and placement was appropriate irrespective of whether the school district or the parents had requested the hearing. RCSA §10-76h-14(a). For the past ten (10) years this allocation of the burden of proof has worked well and has not unfairly burdened schools, or for that matter, parents who file for hearings.

This regulation was enacted after a decision by the Second Circuit Court of Appeals in *Walczak v. Florida Union Free School District*, 142 F. 2d 119 (2d Cir. 1998). The more recent U.S. Supreme Court decision in *Shaffer v. Weast*, 546 U.S. 49 (2005), did not alter Connecticut's regulation and in fact the Court stated that states were free to enact their own laws allocating the burden of proof. Many states have adopted the Connecticut model, including New York, with respect to requiring school districts to establish that their special education program and placement was appropriate for the student, regardless of the whether the parents or school district had requested the hearing.

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School districts have vastly superior professional and economic resources available compared to the resources available to parents. The current regulation has properly balanced the burden of proof and persuasion in these administrative hearings. I know of no case whereby a school district was unfairly prejudiced because it had to prove that its special education program and placement was appropriate.

The Education Committee had received testimony on March 8, 2010 from an attorney who represents Boards of Education in special education proceedings who complained about the costs and inherent unfairness of the current law because school districts have to reimburse the parents' attorney's fees and expert witness fees. Some of this information was not entirely accurate. First, parents may be entitled to be reimbursed for their attorney's fees by a federal court, if they are the prevailing party in the hearing, 20 U.S.C. § 1415 (i) (3) (B) (i); but not for settlements. *Buckhannon v. West Virginia Dept. of Health and Human Services*, 532 U.S. 598 (2001); *Mrs. L. v. Norwalk Board of Education*, 449 F.3d 405 (2d Cir. 2006). Second, the U.S. Supreme Court in the case of *Arlington Central School District v. Murphy*, 548 U.S. 291 (2006), held that parents are not entitled to be reimbursed for their expert witness costs. Third, school districts may recover their attorney's fees from either the parents or the parent's attorney, if the parents file a request for a hearing that is later found by the federal court to be frivolous, without merit, or was filed to harass the school district. 20 U.S.C. § 1415 (i) (3) (B) (ii). If parents can only be reimbursed for their attorney's fees if they prevail in the hearing, parents cannot be reimbursed for expert fees which often exceed several thousand dollars, and the school district may recover their attorney's fees if the parents' case is found to be meritless, the Committee can clearly find the balance of power tips in favor of the school districts.

On a practical level there is no need for the General Assembly to revise the existing law. There are approximately 70,000 students with disabilities receiving special education in Connecticut. During the 2010 reporting period, the Department of Education had received almost 300 hearing requests and only three (3) formal hearings have been convened to date. During the 2009 reporting period, the Department of Education had received over 500 hearing requests and there were approximately thirty (30) formal hearings convened during that reporting period. (This information is available from the Department of Education's special education website.)

Given the small number of formal hearings actually requested or convened; compared to the large numbers of case that are settled through the Department of Education's mediation program and through private negotiations between the parents and school districts, there is a question presented on whether the provisions H.B. 5425 §3 are even required given the fact that on average less than one per cent (1.0 %) of the students or parents ever request hearings, and of that percentage, less than one tenth of one per cent (.10%) ever proceed to formal hearings. The General Assembly rejected similar legislation last year and it should do so this session, as well.

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SECTION 2.

The provision of H.B. 5425 §2 should be revised and amended to allow local and regional boards of education to offer applied behavioral analysis (ABA) to students with autism and other developmental disabilities who may benefit from ABA as part of their special education program. While ABA has been offered to many students with autism, there are other categories of disabilities that may benefit from ABA. Generally, it is the PPT, a team comprised of parents, educators and other professionals who actually decide upon the services should be provided to a student. The proposed legislation may unreasonably limit the availability of ABA to only students with autism, when other students with disabilities may benefit from ABA, as well.

ABA is usually provided by individuals who are certified as a Board Certified Behavior Analysts (BCBA) or they are directly supervised by BCBA's. The proposed legislation does not require that the ABA services be provided by a BCBA or supervised by a BCBA on a regular basis to ensure the quality of the services through the direct observation of the ABA program and/or to review the daily data collected by school district personnel. The proposed legislation allows staff to either be certified by the Department of Education or licensed by the Department of Public Health without requiring a certified BCBA. This is insufficient to ensure that the ABA program was properly designed for the student, properly implemented, and monitored. Often a BCBA will design the ABA program, implement the ABA program and/or monitor the program. The proposed legislation permits staff to be certified by the Department of Education without any corresponding requirement that staff be a certified BCBA. There may be certified staff, such as a teacher or a related service provider, who may be potentially qualified, but the proposed legislation does not require such dual certification. Similarly, the Department of Public Health does not license a BCBA; however, other health care providers may not be qualified to design or implement ABA unless they are either a certified BCBA or have equivalent training or education. The proposed legislation should be revised to ensure that ABA services are only provided and/or monitored by a certified BCBA (or equivalent) to ensure that children with disabilities have ABA programs that are properly designed, implemented, and monitored thereafter.

Thank you in advance for considering this written testimony on H.B. 5425 §2, 3.

Sincerely,



Lawrence W. Berliner

cc. Members of the Education Committee, Chris Calabrese, Committee Clerk